No. 84-1077

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

HAROLD WHITLEY, *ET AL.*,
Petitioners,

v.

GERALD ALBERS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF THE CORRECTIONAL ASSOCIATION OF NEW YORK AND THE PENNSYLVANIA PRISON SOCIETY

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QUESTION PRESENTED

Does the Eighth Amendment protect a prisoner from the unreasonable and excessive use of deadly force by prison officials?

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INTEREST OF AMICI

The Correctional Association of New York, founded in 1844, is a private non-profit civic organization vested with unique legislative authority to visit prisons and to report its findings and recommendations to the New York State Legislature. The Association which has been a close observer of the state of affairs in New York State's many jails and prisons, has in recent public reports commented on the role played by federal courts in shaping and guaranteeing compliance with professional correctional stand-

ards. We believe that liability under §1983 should not be eliminated in emergency situations such as occurred at Attica in 1971. It is in these situations, among all others, that inmates need the protection afforded by this important statute.

The Pennsylvania Prison Society is a private, non-profit membership organization founded in 1787 with the goal of improving prison conditions. In the intervening years the Society has been active in monitoring and urging improvements in Pennsylvania's criminal justice system, and now serves as an educational resource, informing professionals and the general community about existing conditions and practices in prisons, and related institutions, and advocating compliance with professional standards of conduct. We fear that creation of an emergency exception to liability under §1983 will eliminate an important deterrent force in protecting the safety of prisoners and ensuring compliance with those standards at the very moment when the need for such deterrence is greatest.

STATEMENT OF THE CASE

Gerald Albers was shot in the knee from behind by prison guards using shotguns to quell a prison disturbance in which he was not a participant. Albers, an honors prisoner, was housed in Cellblock "A" of the Oregon State Penitentiary. Cellblock "A" has two tiers, with one stairway between them. Albers was housed on the upper tier.

On the night of June 27, 1980, some inmates in cellblock "A" became agitated about what they viewed as mistreatment of other inmates. Administrators responded by issuing an early "cell in" order. One inmate, Klenk, who was particularly upset confronted two guards, assaulting one.

The assaulted guard was able to leave the area, while the other guard remained in the cellblock.

Several older inmates housed in medical cells became afraid that tear gas would be used in order to subdue Klenk. They asked Albers to see whether they could be moved before force was used. In an attempt to quiet the disturbance, Albers left his cell and asked Whitley, the Security Manager, if those in the lower cells could be moved in order to avoid the commotion. Whitley said that he would return with the key.

Instead Whitley returned a while later followed by three guards carrying shotguns. They had orders to shoot low, but to shoot anyone going up the stairs towards the cell where the guard was being held. Without verbal warning or admonition to prisoners to get out of the way Whitley yelled "shoot the bastards" and started up the stairs in pursuit of Klenk. When warning shots were fired Albers turned and ran back up the only stairway in order to return to his cell on the upper tier. As he ran he was shot in the back of the leg by officer Kennecott. A number of other prisoners were injured by the shooting, some in their cells. The officers met with no resistance, and had no trouble subduing Klenk.

Albers introduced expert witness testimony from former correctional officials that a verbal warning could and should have been given which might have avoided the injury to Albers. The experts testified that the use of deadly force against Albers under these circumstances was excessive and unreasonable. The defendants also presented expert testimony which for the most part disagreed with plaintiff's. One of defendants' experts, however, conceded that a verbal warning might have been appropriate if time allowed. After a three-day trial the district court directed a

verdict for the defendants and dismissed Albers' Eighth Amendment claim. The Court of Appeals reversed on this issue and remanded the case for a new trial.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported as *Albers v. Whitley,* 743 F.2d 1372 (9th Cir. 1984). The opinion of the District Court is reported as *Albers v. Whitley,* 546 F.Supp. 726 (D. Or. 1982).

SUMMARY OF ARGUMENT

This case presents the crucial issue of the extent to which the Eighth Amendment protects a prisoner from the excessive and unreasonable use of deadly force by prison officials. It is imperative that this standard be one that will restrain excessive and unreasonable behavior, even in an emergency, while still allowing officials sufficient freedom to act without undue fear of liability.

Several constitutional provisions may be implicated by this case. Under both the Eight and the Fourteenth Amendments, well-settled law requires that force used by prison officials must not be so unreasonable or excessive as to be clearly disproportionate to the need reasonably perceived by prison officials at the time. Since this case involves the use of deadly force, the interests that *Tennessee v. Garner,* 105 S.Ct. 1694 (1985), sought to protect may be implicated as well. The reasonableness standard imposed by that case requires that a prison guard have a reasonable basis for believing that an inmate presents a threat to himself or others, and that appropriate warnings should be issued before deadly force is used.

Either method of legal analysis is consistent with sound policies of modern prison management and with procedures currently followed by state departments of correction. Relevant professional standards, state statutory schemes and the policies and procedures followed by state corrections officials allow use of deadly force in a riot situation, but only as a last resort, and only after appropriate warnings have been given in order to minimize injury.

There was at least one issue in this case appropriately within the province of the jury: whether the shooting of Albers without a verbal warning under all the circumstances was clearly disproportionate to the need perceived at the time. Because this was a jury question, a directed verdict was inappropriate.

ARGUMENT

I. CLAIMS OF EXCESSIVE OR UNREASONABLE FORCE AGAINST PRISIONERS ARE APPROPRIATELY SUBJECT TO JUDICIAL REVIEW UNDER THE CONSTITUTION AND THE PRESENCE OF A "RIOT" SHOULD NOT WHOLLY ABROGATE CONSTITUTIONAL PROTECTION OR JUDICIAL SCRUTINY.

It is well-established under our Constitution that the use of force against prisoners must be justified by and have some reasonable relationship to legitimate correctional goals.[1] This principle has been stated in various ways

[1]This Court has never ruled directly on a prisoner's claim of excessive or unjustified force by prison employees. However, prior holdings imply most strongly that such a claim is actionable under the Constitution. In *Estelle v. Gamble,* 429 U.S. 97, 103 (1976) the Court based its holding that denial of medical care could constitute cruel and unusual punishment on the fact that, like physical abuse, it could result in unjustified pain or actual physical torture. In *Youngberg v.*

under different legal theories. The Court below held that cruel and unusual punishment clause of the Eighth Amendment was violated "when the force used is 'so unreasonable or excessive' to be clearly disproportionate to the need reasonably perceived at the time." 743 F.2d at

Romeo, 457 U.S. 305, 315 (1982) the Court noted that "the right to personal security constitutes a 'historic liberty interest' protected substantively by the due process clause . . . [which] is not extinguished by lawful confinement even for penal purposes." *See also Hutto v. Finney,* 437 U.S. 678, 683 (1978) where the Court noted in connection with a lower court finding of Eighth Amendment violations that some "punishments for misconduct . . . were cruel, unusual and unpredictable" and in footnote references cited lashings with a leather strap, the use of electrical shock, shootings and beatings. *Id.* at notes 4, 5 and 6; and in *Ingraham v. Wright,* 430 U.S. 651 (1977), the Court observed in dictum, "prison brutality . . . is 'part of the total punishment to which the individual is being subjected for a crime, and, as such, is proper subject for Eighth Amendment scrutiny' ". *Id.* at 670 quoting *Ingraham v. Wright,* 525 F.2d 909, 915 (5th Cir. 1976).

The constitutional protection against gratuitous or excessive force is well-established in lower federal courts. *See e.g., Norris v. District of Columbia,* 737 F.2d 1148, 1150 (D.C. Cir. 1984) (that the use of force was both gratuitous and excessive is enough to withstand dismissal); *Lock v. Jenkins,* 641 F.2d 488, 495 (7th Cir. 1981) (prison officials violate due process making an unprovoked attack on a prisoner); *King v. Blankenship,* 636 F.2d 70, 73 (4th Cir. 1980) (beating and ripping beard from face of prisoner wholly unjustified under the circumstances); *Meredith v. State of Arizona, 523 F.2d 481 (9th Cir. 1975); Hamilton v. Chaffin,* 506 F.2d 901 (5th Cir. 1975) (use of excessive force constitutes a violation of the fourteenth amendment); *Curtis v. Everette,* 589 F.2d 516 (3rd Cir. 1973) (conduct which shocks the conscience violates the Fourteenth Amendment); *Howse v. DeBerry Correctional Institute,* 537 F.Supp. 1177, 1182 (M.D. Tenn. 1982). Without citation, the same standard was followed in the Eighth Circuit; *Jones v. Mabry,* 723 F.2d 590 (8th Cir. 1983). *See also, Ridley v. Leavitt,* 631 F.2d 358 (4th Cir. 1980) (if the threat of disorder or disobedience has subsided, only reasonable force under circumstances may lawfully be employed).

1375 quoting *Jones v. Mabry,* 723 F.2d 590, 596 (8th Cir. 1983).[2]

Judge Friendly of the Second Circuit in *Johnson v. Glick,* 481 F.2d 1028 (2nd Cir. 1973) *cert. den.* 414 U.S. 1033 (1973), preferred analyzing the claim of a "spontaneous attack by a guard" under the due process rationale of *Rochin v. California,* 342 U.S. 165, 172 (1952), prohibiting conduct that "shocks the conscience." Judge Friendly concluded that "application of undue force" by police officers or correctional officers violates the standard, and continued in now famous language

> . . . Not every push or shove, even it may later seem necessary in the peace of a judge's chambers, violates a prisoner's constitutional right. In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm. *Id.* at 1033.

Amici take no position on whether a due process

[2]The Court below also invoked the concept of "deliberate indifference" as a criterion for determining whether the use of deadiy force was justified. Borrowing this term from *Estelle v. Gamble,* supra, *amici* do not take this usage as significantly modifying or qualifying the language quoted from *Jones v. Mabry.* If prison officials use force that is "clearly disproportionate to the need reasonably perceived at the time" it is fair to conclude that they have acted with deliberate indifference; if the force they use is consistent with the need reasonably perceived a finding of deliberate indifference could not be justified.

analysis or an Eighth Amendment analysis is preferable.[3] It seems clear that under either amendment and either of the above quoted standards, the use of force against prisoners must be tailored to the needs of security, order or discipline as they were reasonably perceived by prison personnel at the time the force was applied. *Amici* believe that this principle is a salutory one and that this Court should adopt and enforce it. Moreover, *amici* believe that judicial review of claims of excessive force including trial by jury is appropriate and helpful in forcing and maintaining professional standards of prison management which uniformly condemn the gratuitious or excessive use of force.[4]

There is not and should not be a "riot" exception to this constitutional principle.[5] Experience shows that riots, disturbances and other prison emergencies are times when passions run high, anxiety is great, and the potential for serious unprofessional and ultimately counterproductive misconduct by prison personnel is correspondingly enhanced. See, e.g., *Inmates of Attica Correctional Facility v. Rockefeller,* 453 F.2d 12 (2nd Cir. 1971).

By the same token, a riot or disturbance may necessitate conduct which would clearly be inappropriate as part of routine prison management. Violent and disruptive inmates may have to be treated violently and peremptorily in order to safeguard life and restore order. However, acknowledging this reality does not require the Court to suspend all scrutiny of prison employees' acts and in effect, declare "open season." Rather, the governing legal standard should be flexible enough to accommodate the extreme exigencies of a prison disturbance as well as the more ordinary guard brutality claim. The standards asserted by the Ninth Circuit in this case and by Judge Friendly in *Johnson v. Glick,* both quoted *supra,* are quite suitable for this purpose since they allow ample room for consideration of the needs for force based on the needs of the particular situation confronting those charged with running the prison.

[3]Indeed Courts have used the same language under either a due process or an Eighth Amendment analysis. *Johnson v. Glick; Putman v. Gerloff,* 639 F.2d 415 (8th Cir. 1981); *King v. Blankenship,* 636 F.2d 70, 73 (4th Cir. 1980); *Furtado v. Bishop,* 604 F.2d 80, 95 (1st Cir. 1979); and *George v. Evans,* 633 F.2d 413 (5th Cir. 1980).

[4]Although the Court has never explicitly held that trial by jury is available under §1983, it has cited the availability and importance of jury trials in recognizing an Eighth Amendment damage claim against prison officials. *Carlson v. Green,* 442 U.S. 14, at 22-23 (1980). See also *Curtis v. Loether,* 415 U.S. 189 (1974) (jury trial available under fair housing provisions of Civil Rights Act of 1968). The lower federal courts are agreed that jury trials are available under §1983. *Dolence v. Flynn,* 628 F.2d 1280, 1282 (10th Cir. 1980) and cases cited therein.

[5]Insofar as Petitioners suggest that the usual standards of review of prison brutality claims do not apply to cases arising out of a "riot," Petitioners' Brief at 34-37, and 43-44, they ask the Court to create an exception when it has never passed on the underlying rule governing the use of force in prisons. Insofar as the Court finds it appropriate to explore the general standard for prison use of force, this case – involving as it does extreme behavior on the part both of the prison officials and some prisoners – may not be the appropriate factual vehicle for such an inquiry. After all, most prison brutality cases involve rather different allegations: e.g., physical retaliation against inmates who have personally offended guards or engaged in trivial misconduct, see *Johnson v. Glick,* supra; abusive over-reaction by prison employees against inmates who have committed more serious misconduct, see *King v. Blankenship, supra,* 636 F.2d 70 (4th Cir. 1980); *Martinez v. Rosado,* 614 F.2d 829, (2nd Cir. 1980); or use of force as a routine means of keeping order where the guard staff is inadequate. See *Hutto v. Finney,* 437 U.S. 678, 684 (1978); *Ruiz v. Estelle,* 503 F.Supp. 1265, 1299-1302 (S.D.Tex. 1980), *aff'd in part and rev'd in part on other grounds,* 679 F.2d 1115 (5th Cir. 1982).

For these reasons, the Court reasonably might conclude that certiorari was improvidently granted in this case.

II. LIMITS ON THE USE OF DEADLY FORCE, EVEN IN AN EMERGENCY, ARE CONSISTENT WITH PRINCIPLES OF SOUND PRISON MANAGEMENT.

This Court has properly been concerned that prison administration be left within the sound discretion of prison officials. *Rhodes v. Chapman,* 452 U.S. 337 (1981); *Procunier v. Martinez,* 416 U.S. 396 (1974); *Block v. Rutherford,* ____ U.S. ____, 104 U.S. S.Ct. 3227 (1984); *Hudson v. Palmer,* ____ U.S. ____, 104 S.Ct. 3194 (1984). Even in the best of circumstances prisons are difficult to manage and at times may be volatile and dangerous. Judges and juries therefore ordinarily are well-advised to defer to the judgment of prison officials and avoid intervening or second-guessing decisions of prison officials unless it is essential to safeguard constitutional rights.

The policy of deference to the judgment of correctional officials requires that this Court examine the policies and standards of the profession to ascertain how the profession views the use of deadly force in emergency situations. Such an examination reveals strong support for the view that where deadly force is involved prison officials must exercise restraint. The use of deadly force obviously carries with it the distinct possibility that values held in highest esteem by the Constitution – life and liberty – may be lost in the heat of the moment. It is essential that restraints apply in emergencies as well as in less emotionally charged times.

For this reason the corrections profession has developed standards and policies which apply whenever deadly force is used. Compliance with these standards is essential in order to limit the use of deadly force only to instances where it may accomplish the valid objectives of safeguarding lives of staff and inmates and preserving order

without unnecessarily compromising the safety of others, including non-participating inmates.

The tragic result of not practicing restraint was documented in the *Official Report of the New York State Special Commission on Attica* ("The McKay Commission Report") (Praeger, N.Y. 1972). In the Attica riot of 1971 forty three citizens were killed. Thirty-nine of these inmates and correctional officials died from gunfire used by state police and prison guards during retaking of the prison. The McKay Commission found that:

> . . . the conclusion is inescapable that there was much unnecessary shooting. Troopers shot into tents, trenches and barricades without looking first. In addition, even where the firing may have been justified – as in the case of a State Police lieutenant assaulted by an inmate in D yard – the use of shotguns loaded with buckshot in the heavily populated spaces of D yard led to the killing and wounding of hostages and inmates who were not engaged in any hostile activity. *Id.* at 335.

After making these findings the Commission made recommendations concerning future use of force in similar situations.

> The Commission believes that when the state commits an armed force against its own citizens, however provocative their conduct, *the state has a compelling moral obligation to ensure that such force is suitable for the mission; that it is controlled, restrained, and applied with precision against only the threats which justify its use.* Every aspect of such an operation must be considered, reasoned and deliberate, with the full realization that a failure to meet these obliga-

> tions can only result in the destruction of the very order the state seeks to preserve by its action. *Id.* at 348. (emphasis added)

The Commission specifically noted that protection of non-active participants must be taken into account when using deadly force.

> Precautions against killing or wounding such [non-active participants or those involved against their will] should have been an integral part of any assault plan. *Id.*

The McKay Commission Report also stressed the importance of verbal warnings to minimize injury and to minimize the amount of force used:

> When possible the use of deadly force shall be preceded by a clear warning to the individual or group that such force is contemplated or imminent.
>
> * * *
>
> The primary rule which governs the action of military forces in assisting state and local authorities to restore law and order is that the commander must, at all times, use only the minimum force required to accomplish the mission. . . . *Id.* at 364.[6]

If prison officials were allowed to use force with only minimal legal restraints the managers of correctional institutions would face far greater difficulty in assuring that their subordinates conformed their conduct to accepted professional standards.

[6]These recommendations from the Commission were taken from a plan developed by the New York State National Guard prior to the Attica riot. The existence of this plan, named Operation Skyhawk, "was forgotten at Attica . . . when the time came to reap the benefits of the professional foresight of Skyhawk's authors, their work-product lay in its folder in the files of the National Guard in Albany." *Id.* at 365.

Compliance with standards developed by the corrections profession will advance the dual goals of preserving institutional order and preventing prison guards from using excessive and unnecesary force in emergency situations.

III. THE EIGHTH AMENDMENT MUST BE INTERPRETED IN LIGHT OF EVOLVING STANDARDS OF DECENCY. THESE STANDARDS REQUIRE THAT WHEN PRISON OFFICIALS USE DEADLY FORCE IT IS USED ONLY AS A LAST RESORT, ONLY TO THE EXTENT NECESSARY TO ACHIEVE LEGITIMATE SECURITY GOALS, AND ONLY AFTER APPROPRIATE WARNINGS HAVE BEEN GIVEN.

A. Determination of Eighth Amendment standards of decency requires resort to objective criteria.

In dealing with conditions of confinement this Court has said that the Eighth Amendment prohibits punishments which although not physically barbarous, "involve the unnecessary and wanton infliction of pain," *Gregg v. Georgia,* 428 U.S. 153, 173 (1976) (joint opinion). The Court has interpreted the words of the Eighth Amendment in a "flexible and dynamic manner" *Id.* at 171. Since the Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles,* 356 U.S. 86 (1958). In determining evolving standards of decency "a court's judgment should be informed by objective factors to the maximum possible extent." *Rhodes v. Chapman,* 452 U.S. at 345-346 *quoting Rummel v. Estelle,* 445 U.S. 263, 275 (1980).

Professional standards and model codes do not by themselves set constitutional minima. *Bell v. Wolfish,* 441 U.S. 520, 543 n. 27 (1979). Yet if the command of *Rhodes v. Chapman,* to interpret the Eighth Amendment in terms of objective criteria is to be applied, it must mean that courts and juries must heed the voices of state legislatures and state departments of correction in determining what is allowed by contemporary standards of decency. *Id.* at 347. When an aspect of punishment is universally discarded by state agencies which actually manage prison facilities it would be appropriate for a court or jury to conclude that the practice falls beneath the evolving standards of decency. To the degree that *amici* have been able to determine, the corrections profession as a whole rejects the use of corporal punishment, and will not permit the imposition of deadly force to any extent greater than that necessary to maintain order in the institution.

B. Contemporary standards of decency require that limitations on the use of deadly force apply in the prison context. The reasoning of the court in the *Garner* case is relevant.

Last term this Court determined the constitutional limitations placed upon the use of deadly force when a police officer arrests a fleeing felon. *Tennessee v. Garner,* 105 S.Ct. 1694 (1985).

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if where feasible, some warning has been given. *Id.* at 1701.

In arriving at the appropriate constitutional standard, the Court surveyed state statutes and departmental policies, and found that such limitations on the use of deadly force were reasonable. A similar look at state statutes, professional standards, and departmental policies indicates that a prisoner's right not to be subjected to unjustified use of deadly force is one that our society is willing to protect. Compare with *Hudson v. Palmer,* 104 S.Ct. at 3199 (where the court found that a prisoner has no protected privacy interest with respect ot the contents of his cell).

1. State Statutory Schemes Apply the Same Principles of Justification to Prison Guards as to Police Officers.

In *Garner,* this Court found that fewer than half of the states still allowed use of deadly force for the purpose of arresting a fleeing felon. *Id.* at 1701. *Amici* have conducted a similar review of state laws concerning the use of deadly force by prison officials. While not all state codes explicitly mention prison guards or wardens, to the extent that they do, they apply similar restrictions to both police officers and prison guards. It can fairly be said that such guards are generally not given more latitude in the use of force than police officers. As the American Bar Association commentary to its standard for the use of deadly force in the prison context points out:

> since corrections officers are not considered law enforcement officers in the full sense of the term

> as it applies to police and federal officers like FBI agents, *corrections officers certainly should be granted no broader license in the use of force than society is willing to grant its police.* American Bar Association, Standards for Criminal Justice, *Legal Status of Prisoners,* Commentary to Standard 23-6.13 Use of Force or Deadly Force (Fourth Tentative Draft 1980).[7] (emphasis added)

This policy is consistent with the approach taken in the Model Penal Code which has served as a pattern for many state laws. It explicitly holds prison guards accountable for use of force to the same degree as police officers.[8] The central portions of the Code dealing with use of deadly force by prison guards are the same provisions referred to in *Garner* dealing with the use of force by a police officer, and a continuation of that portion dealing with the use of deadly force to quell a riot. *Id.* §307.

Under the Model Penal Code deadly force may be used only if it does not present a threat to innocent persons, and the person against whom deadly force is used presents a threat of serious harm to the officer or others if his apprehension is delayed. Model Penal Code, §307 (b)(iii). During a riot deadly force may be used only after orders have been given to desist, and appropriate warnings have been given. *Id.* at §307 (5)(a)(ii)(2).

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[7]These standards and commentary were approved by the House of Delegates on February 9, 1981. When republished in final form the standards were renumbered. The "Use of Force and Deadly Force" Standard appears as 23-6.12.

[8]The Code allows prison guards to use such force as is necessary to maintain order but only such deadly force as is justifiable elsewhere under the Code. American Law Institute, *Model Penal Code, Section 308 Use of Force by Persons with Special Responsibility for Care, Discipline or Safety of Others.* (Proposed Official Draft 1962).

Amici have conducted a survey which indicates that at least 35 states have placed a reasonableness or necessity limit upon the use of deadly force by prison officials. This suggests that it would be appropriate to place the same constitutional limitations on the use of deadly force by prison guards as is placed on police officers.

Twenty-two states have adopted a general principle of justification which requires that prison guards use only such physical force as is reasonable or necessary under the circumstances to maintain order and discipline.[9] In only one of these jurisdictions is a guard or warden allowed to use unlimited force in order to maintain discipline.[10] Four of these states have statutes that deal with escapes, but do not address the use of force in other contexts.[11] But fully seventeen of these twenty-two states have statutes which allow a warden to use only such force as is reasonable or

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[9]Ala. Code §13 A-3-24, 27 (1982); Alaska Stat. Ann. §11.81.370, 410 (1983); Ariz. Rev. Stat. Ann. §13-403(2), 410 (1978); Ark. Stat. Ann. §41-505 (1977); Colo. Rev. Stat. §18-1-703 (1978); Conn.Gen.Stat. §53 a-18(2) (1972); Del.Code Ann., Tit. 11 §467, 468 (1979); Fla. Stat. §944.34 (1983); Haw.Rev.Stat. §703-307, 309(5); Ill.Rev.Stat., Ch. 38 §§7-8, 1003-6-4 (1984); Ky. Rev. Stat. §503.090 (1984); Me.Rev.Stat.Ann., Tit. 17-A- §§107(5) (1983); Mo. Ann. Stat. §563.056 (1951 and 1985 Supp.); Mont.Code Ann. 45-3-106 (1983); Neb.Rev.Stat. §28-1413(5); N.H. Rev.Stat.Ann. §627:5(II), (V); N.J.Stat. Ann. §2C-3-7, 8 (West 1982); N.Y. Penal Law §35.30(2); (McKinney 1974 and Supp. 1985); N.D.Cent. Code. §12.1-05-07.2d(1) (e) (1976); Ore.Rev.Stat. 16.205 (1983); Pa.Stat.Ann. Tit. 18 §508, 509 (Purdon); Massachusetts adopted the Model Penal Code by judicial decision, *Julian v. Randazzo,* 380 Mass. 391, 403 N.E. 2d 931 (1980).

[10]This state is Florida. Alabama has statutory language that appears to allow any degree of force to be used, but it has been limited by decision. *Ayler v. Hopper,* 532 F.Supp. 198 (M.D. Ala. 1981).

[11]Kentucky, North Dakota, New Hampshire and Montana.

necessary in order to maintain discipline,[12] and ten of these, like the Model Penal Code, expressly apply the same standard for use of deadly force to guards as to other law enforcement officials.[13] Finally, though concern for innocent bystanders is implicit in any reasonableness standard, at least six states have statutes which explicitly disallow use of force without regard for third parties.[14]

Ten more states have statutes which apply a reasonableness standard to the use of force by law enforcement officials or persons with a special duty of care for others by means of a statute that is broad enough to include prison officials.[15]

A further group of nine states deal with justifiable homicide in a way that could be interpreted as applying to

[12]Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Massachusetts (by judicial decision), Missouri, Nebraska, New Jersey, New York, Oregon, and Pennsylvania.

[13]Alaska, Arkansas, Delaware, Hawaii, Maine, Missouri, Nebraska, New Jersey, New York, and Pennsylvania.

[14]These include the states which have adopted the Model Penal Code verbatim, Hawaii, Nebraska. See also Delaware, New Jersey, New York, and Pennsylvania.

[15]Ga. Code §16-3-21(a) (1984); Idaho Code §20-111 (1979) (if reasonably feels that life of self or other is threatened). Indiana has a statute forbidding corporal punishment of prisoners. Ind. Code Ann. §11-11-5-4 (West 1976), and a court decision that holds that the state owes prisoners the same duty of care for protection from harm as that due the general public. *Roberts v. State,* 307 N.E.2d 501, 159 Ind. App. 456 (1974). Iowa Code 804.8 (1983); Kan. Stat. Ann. 21-32115-3216 (1981); Minn. Stat. 609.06, 1065 (1984); N.C. Gen. Stat. §15A-401 (1983); Tex Penal Code Ann. §9.52 (1978); *Williams v. Thomas,* 511 F.Supp. 533 (N.D. Tex. 1981); Maryland has no law directly on point but a decision allows liability for constitutional violations. *McCray v. Burrell,* 622 F.2d 705 (4th Cir. 1980); Michigan also has no statute on point. An Attorney General's opinion states that prison guards are liable to the same extent as private citizens for the discharge of firearms. Op. Atty. Gen. #2208 at 449 (1955-6).

law enforcement officials.[16] Of these only four[17] could be considered as placing no limit on the use of deadly force by prison officials. And even with these a homicide is considered justified only if it is committed in the pursuit of some legal duty. In the remaining five, there is an explicit reasonableness limitation placed on the use of deadly force.[18]

Of the nine remaining states, six have statutes granting immunity to law enforcement officials for the use of deadly force during a riot.[19] Of these, one state requires that such force be reasonable.[20] The remaining states do not have statutes which are pertinent.[21]

Since these statutes generally limit deadly force to only that which is reasonable and necessary but do not explicitly address the context of an emergency situation, more specific guidance on the use of deadly force must be found by examining professional standards and the actual policies of state departments of corrections.

[16]Cal. Pen. Code Ann. §196 West (1970); La. Stat. Ann. 14.20 (1974); Nev. Rev. Stat., §200.140 (1983); N.M. Stat. Ann. 30-2-6 (1978); Okla. Stat. Tit. 21, §732 (1981); Utah Code Ann. 76-2-404 (3) (1978); Vt. Stat. Ann. Tit. 13, §§904, 2305 (1974); Wash. Rev. Code. §9A. 16.040 (3) (1977); Wisc. Ann. 939.45 (1982).

[17]Oklahoma, Nevada, New Mexico and Washington.

[18]Louisiana, Utah, Wisconsin, Vermont. California is a member of this group by judicial decision. *Kortum v. Alkire,* 69 Cal. App. 3rd 324, 333-338, 526 P.2d 241, 245-250 (1974).

[19]Miss. Code Ann. 97-3-15 (d)(1)(g) (Supp. 1984); Ohio Rev. Code, 2917.05 (1982) (deadly force justifiable if threat of serious harm); Tenn. Code Ann. §40-7-109 (1982); Code of Va. 18.2-42 (1950); S.C. Code §24-3-750 (1976); S.D. Code Law §22-16-32 (1979); See also Vermont, *supra.*

[20]Virginia, *see also* Vermont. This survey is not exhaustive of state statutes involving use of force during riots. Those states which follow the Model Penal Code require appropriate warning.

[21]Rhode Island, West Virginia and Wyoming.

2. *Professional standards require that deadly force be used only as a last resort and that appropriate warnings be given.*

The American Correctional Association (A.C.A.) standards are the most widely followed guidelines for the operation of prisons and jails. The standards have been promulgated by the largest national professional organization of correctional officials in the United States and Canada. Not only have these standards had a major influence on the standards issued by the Department of Justice, See *Federal Standards For Prisons and Jails* (1980), at 2, they are also utilized by the Commission on Accreditation for Corrections as the yardstick for evaluating of correctional facilities involved in the accreditation process. In 1980, 600 correctional institutions were involved in that process. This constituted nearly one fourth of the nation's correctional institutions. A.C.A. standard 2-4206, which is denominated "mandatory" for accreditation purposes requires that:

> Written policy and procedure restrict the use of physical force to instances of justifiable self defense, protection of others, protection of property, and prevention of escapes, *as a last resort* and in accordance with appropriate statutory authority. *In no event is physical force justifiable as punishment.* A written report is prepared following all uses of force and is submitted to the administrative staff for review.

A.C.A., *Standards For Adult Correctional Institutions, 2nd Ed. (1981).*[22] (emphasis added)

[22]Paragraph 6.15 of the *Federal Standards For Prisons and Jails* uses the exact language of the A.C.A. standard.

The operational meaning of the A.C.A. standard is fleshed out by the A.C.A.'s model regulation on the use of firearms.[23]

1. Firearms shall be used only in situations where there is danger of death or grievious bodily harm. *Firearms shall not be discharged if less extreme measures will suffice . . .*
2. An officer may fire under the following circumstances.

   a. At an inmate or other person carrying a weapon or attempting to obtain a weapon by force, if the officer has reason to believe that the inmate/person intends to cause death or serious injury.

   b. At an inmate or other person whom the officer has seen kill or seriously injure any person and who refuses to halt when ordered.

   c. At an escaping inmate if the escape is actually in progress and cannot be reasonably prevented in a less violent manner.

   d. At an inmate or person is there is no other way to prevent personal injury or death.

3. *Time permitting, a clear oral warning or order shall be given before shots are fired.*
4. *The firing of warning shots is not mandatory. However, time permitting, such shots shall be fired if there is no reasonable likelihood of serious injury or death resulting to innocent persons.* A.C.A., *Guidelines for the Development of policies and Procedures: Adult Cor-*

[23]*See* A.C.A. Standards 2-4097, 4098, 4185, 4186, 4191, 4206, 4341.

> *rectional Institutions,* (1981), p. 224 (emphasis added).

Moreover, in its model riot control plan, the A.C.A. requires removal of non-participants.

> a. Prisoners not wishing to participate in the riot must be given an opportunity to withdraw from the disturbed area.
>
> b. Prisoners should be provided safe conduct to a non-affected secure area. *Id.* at 299.

Thus, the standards suggested by prison officials from state and federal prisons for use of firearms, and for protection of third parties in riot situations require that oral warnings, and/or warning shots be used, when appropriate, and that non-participants be allowed to get out of the way.

The standards adopted by the American Bar Association are equally emphatic that any use of deadly force must be justifiable:

> *Standard 23-6.13. Use of force or deadly force.*
>
> (a) . . . (ii) *Physical or deadly force* should be authorized when the correctional employee is confronted with a situation that would *reasonably support* an on-site judgment that physical or deadly force is *immediately necessary to* effectuate one of the purposes listed below . . . *Deadly force should not be authorized unless otherwise justified by the law of the jurisdiction governing self defense or the defense of others.* American Bar Association, *Standards For Criminal Justice, Legal Status of Prisoners,* Standard 23-6.13, (1981). (emphasis added)

The commentary to the ABA standard underscores the need to carefully limit the use of deadly force:

> At first blush, there might appear to be three instances in which correctional authorities and officers may feel justified in using force in the prison setting where there would be no comparable circumstances in free society, namely to prevent escape, to regain control of an institution after an inmate takeover, and to enforce prison rules and regulations. Nevertheless, despite the seriousness of these three types of situations, *there can be no disputing the fact that force should be used only when reasonably necessary. Even then, the level of force used should not exceed the form or degree necessary to accomplish whatever purpose justifies the use of force. Id.* (emphasis added).

All of these standards converge on the point that deadly force is to be used only when reasonable, and not in any degree greater than needed to accomplish the purpose justifying its use. Moreover, as pointed out earlier, the standards agree on the point that the standard to be applied to the use of force by prison officials should be no lower than that applied to police officers.

3. *Actual Prison Policies Prohibit the Unnecessary or Excessive Use of Force.*

Equally important as professional standards is the fact that the principles embodied in them have been adopted by many departments of corrections.[24] Based on a survey

[24]The Federal Bureau of Prisons claims adherence to both the A.C.A. standards and the Justice Department's *Federal Standards for Prisons and Jails.* Title 42 U.S.C. §1997f(5) requires the Attorney General to report to the Congress on "progress made in each Federal Institution toward meeting existing promulgated standards for such institutions. . ." In several reports to Congress the Department noted that the Bureau has taken steps to obtain accreditation from the Com-

conducted by *amici,* we excerpt *infra,* selected examples of policies and procedures. Copies of the policies of these states and others are available from *amici* and will be provided upon request.

ALASKA

Policy Number 803.09 (January 21, 1985)

"Time permitting, a clear verbal warning or order must be given before shots are fired. . . . Before the application of deadly force, all other reasonable means of control must be exhausted. As policy, whenever possible, a show of force will be made prior to the application of force. Deadly force will be applied only as a last resort. Corporal punishment in any form and/or the application of excessive force is prohibited."

ARIZONA

Special Order 690.8.8 (July 1, 1983)

"In no event is force considered justifiable as punishment or discipline. Physical force is used as a last resort and when used must be limited to that amount necesary to control and/or move inmates."

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mission on Accreditation for Corrections for each of its facilities and that to date, 34 of the Bureau's 45 institutions have been accredited. See e.g. *Fiscal Year 1984 Report to Congress Pursuant to the Civil Rights of Institutionalized Persons Act,* at 28. An earlier report stated that the "[t]he goal of the federal system . . . is that all federal correctional facilities be (1) accredited by the Commission on Accreditation for Corrections, and (2) meet the Federal Standards for Prisons and Jails issued by the Department of Justice." *Report of the Attorney General to Congress Regarding Activities Initiated Pursuant to the Civil Rights of Institutionalized Persons Act,* 42 U.S.C. §1997 [as required by 42 U.S.C. §1997], pp. 12-13.

ARKANSAS

Administrative Regulation #30409(8)
(February 23, 1980)

"An employee shall use deadly force only to save his own life or the life of another immediately threatened by an inmate. All alternative methods of controlling the inmate must be ineffective to justify use of a firearm. . . . The firing of a weapon where it may endanger other individuals is ordinarily not appropriate."

FLORIDA

Policy Number 323.0666 (June, 1985)

"When circumstances permit, a warning shot should be given before bodily injury is inflicted. . . . [Deadly force will be used] only as a last resort when it reasonably appears that alternatives are not feasible . . . only that amount and type of force [may be used] that reasonably appears necessary. . . . Firearms shall not be discharged when there is a substantial danger to innocent bystanders."

IOWA

Policy Code 1

"Use of deadly force to stop an escape . . . In a loud voice, twice call the inmate to HALT . . . Warning shots shall never be fired. . . . Use of deadly force is justified only under conditions of extreme necessity as a last resort to protect the life or safety of staff, other inmates or bystanders . . ."

MICHIGAN
Policy Number R791.5564

"Where the circumstances permit [gunfire] shall be preceded by either an oral warning or a warning shot. . . . force shall be used only after all other reasonable alternatives are exhausted. Only the force necessary in the circumstances shall be permitted."

MINNESOTA
Policy Number 3-208.0

"It is imperative that the least amount of force necessary in any given circumstances is the amount used. Excessive use is dysfunctional from an institutional standpoint and is inconsistent with providing the most humane environment possible. Deadly force may be used only as a last resort."

MISSOURI
Title 14, Div. 20, Chap. 10; 20-110,060

"Use of any type of force for punishment or reprisal will be strictly prohibited . . . only the minimum force necessary for control shall be used . . . Deadly force will be used only as a last resort and only when there is no other way to prevent grievious personal injury or death to oneself or another person."

NEW YORK
Title 7 N.Y.C.R.R. §251.2(f)(1)

"Firearms . . . shall not be used except as a last resort and then only in situations where the employee reasonably believes that deadly physical force is necessary . . . Before aiming a

firearm at any person, an employee shall, whenever possible, give due warning, orally or by firing a shot to the air or in some other readily understandable manner. . . . corporal punishment is absolutely forbidden for any purpose and under all circumstances. (§250.3) . . . Where it is necessary to use physical force, only such degree of force as is reasonably necessary required shall be used." §251.1

OHIO
Policy Number 5.20-9-01

"Whenever possible, an appropriate warning shall be given prior to the use of deadly force. *In no event shall a warning with a firearm be appropriate within a building.* (original emphasis) . . . Force or physical harm to person shall not be used as prison punishment. . . . Excessive force means an application of force which exceeds that force which is reasonably necessary under all the circumstances."

SOUTH CAROLINA
Policy Number 1500.2 (October 2, 1979)

"Use of force is never justified as punishment . . . [Firearms] may be used only as a last resort and only after appropriate warnings have been given to stop prisoners in flight." Policy 1500.8, at 5 (March 5, 1980). The new draft policy prohibits discharge of a firearm "when it appears possible that an innocent person will be hit." *Id.* §7(a).

VIRGINIA
Guideline 412 (October 1, 1983)

". . . a warning shot may be used if in the opinion of the officer it can be fired safely. Firearms shall

be employed only as a last resort . . . when all other alternatives have failed."

WISCONSIN
HSS 306.07

". . . insofar as it is feasible . . . verbally warn the inmate to stop the activity giving rise to the use of the firearm and inform the inmate that the staff member possesses a firearm. If the warning is disregarded, fire a warning shot. . . . only so much force may be used as is reasonably necessary. . . . Use of excessive force is forbidden. . . . Deadly force may not be used if its use creates a substantial danger of harm to innocent third parties unless the danger created by not using such force is greater than the danger created by using it."

WASHINGTON STATE
Police Directive, 420.208, 6.B.i.a. and b
(August 10, 1984)

policy requires a "verbal order to cease and desist" and a warning shot.

IV. THE JURY SHOULD HAVE BEEN ALLOWED TO DETERMINE THE MERITS OF RESPONDENT'S CLAIM.

Amici take no position as to whether Mr. Albers' rights were violated or whether he should be awarded damages.[23] However, applying the principles asserted in this brief we

[23] *Amici* claim no expertise regarding the qualified immunity defense raised by the Petitioners. However, we believe that the right of prisoners to be free of gratuitious and excessive force was "clearly established" by 1980. *Harlow v. Fitzgerald,* 102 S.Ct. 2727 (1983).

believe that he submitted evidence entitling him to a jury determination of his claim.

Albers produced evidence which tended to show that there was no justification for shooting *him* without any warning. Whatever rationale may have existed for other shootings, there is evidence that he was well known to be a well-behaved inmate, that he did not participate in the disturbance, and indeed that he was cooperating with Petitioner Whitley up until the shooting. At the time Albers was shot he was unarmed, and was fleeing by the only route available to his own cell and safety. It is arguable that there were several points before the shooting when Albers could have been warned or told to halt.

A jury also might have concluded that the giving of an order to shoot *anyone* who went up the stairs regardless of identity or circumstances was itself "clearly disproportionate to the need reasonably perceived at the time." 743 F.2d 1372.

Again, while *amici* have no view as to the proper outcome of Mr. Albers' trial, we think it is clear, however, that he was entitled to have that outcome decided by the jury.

CONCLUSION

For the foregoing reasons *amici* urge this Court to affirm the opinion of the Ninth Circuit.

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